



18th September 2018

Agenda Item: 8

REPORT OF CORPORATE DIRECTOR – PLACE

DRAFT RESPONSE TO THE MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT AND THE DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY ON THE TWO CONSULTATION PAPERS RELATING TO SHALE GAS PROPOSALS.

Purpose of Report

1. To seek Members views and input on the County Council's draft response to the Government's consultation papers relating to shale gas proposals entitled 'Permitted development for shale gas exploration' and 'Inclusion of shale gas projects in the nationally significant infrastructure project regime'. The views of Members on this report will be used to finalise the County Council's final response on these two consultations which will be brought to Planning and Licensing Committee in October for final approval prior to being submitted to the Government as the Council's formal response.

Background information

2. On the 19th July 2018 the Government published two consultation papers relating to shale gas proposals. The Ministry of Housing, Communities and Local Government published a consultation on the principle of whether non-hydraulic fracturing shale exploration development should be granted planning permission through a permitted development right. This consultation paper can be found at Appendix 1 of this report. The second paper, published by the Department for Business, Energy and Industrial Strategy, is consulting on the criteria required to trigger the inclusion of shale gas production projects into the Nationally Significant Infrastructure Projects regime. This consultation paper can be found at Appendix 2 of this report. The closing date for comments on both consultations is 25th October 2018.
3. An Inquiry by the Parliamentary Housing, Communities and Local Government Committee held in May this year examined matters relating to fracking applications, including whether they should be permitted development and also whether they should be dealt with as national infrastructure (NSIPs) under the 2008 Planning Act. Their conclusions on these issues are set out in paragraphs 28 and 42-45 of this report.

Ministerial Written Statement relating to shale gas made on 17th May 2018

4. On 17th May 2018 the Secretary of State for Business, Energy and Industrial Strategy released a written statement on his own behalf and on behalf of the Secretary of State for Housing, Communities and Local Government reiterating the Government's view that there are substantial benefits from the safe and sustainable exploration and development of onshore gas resources. He also wished to set out the actions they are taking to support this. He outlined the potential to deliver substantial economic benefits to the UK economy and the creation of British jobs. He stated that recent decisions on shale gas exploration planning applications remain disappointingly slow against the statutory 16 week timeframe. He outlined a number of measures to apply to such proposals in England.
5. This Statement is now a material consideration in plan-making and decision-taking, alongside relevant policies of the National Planning Policy Framework. He said the Government expects Minerals Planning Authorities to give great weight to the benefits of mineral extraction, including to the economy. He stated that the revised NPPF (which was subsequently published on 24th July 2018) will sit alongside the Written Ministerial Statement. He stated the intention to publish revised planning practice guidance on shale development to provide clarity on issues such as cumulative impact and local plan making, and provide confirmation that planners can rely on the advice of regulatory experts.
6. In the Statement he announced that these two consultations would take place in summer 2018. He also stated that the Government will strengthen community engagement by consulting in due course on the proposal to make pre-application consultation a statutory requirement. Other measures, including support for those involved in decision making, matters relating to the shale regulators, and community benefits were also set out in the statement which was made in both the House of Commons and the House of Lords.

Consultation paper entitled 'Permitted development for shale gas (published by Ministry of Housing, Communities and Local Government - July 2018)

7. Paragraphs 8 to 26 below set out the issues raised in the consultation paper which can be found in Appendix 1. The questions posed by the consultation and the draft responses are set out in Appendix 3 to this report.

Permitted development

8. Permitted development rights are a national grant of planning permission. They provide a simpler, more certain route to encourage development and speed up the planning system, and reduce the burden on developers and local planning authorities by removing the need for planning applications.

9. Permitted development rights are set out in the Town and Country Planning (General Permitted Development) (England) Order 2015. The Order sets out both what is allowed under each permitted development right, and any exclusions, limitations and conditions that apply to comply with the legal duty to mitigate the impact of development granted under permitted development. For example, most permitted development rights are subject to conditions that seek to minimise their impact and to protect local amenity. Others are subject to geographic exclusions to ensure environmental protections are maintained.
10. If a proposal falls outside permitted development rights, it requires the submission of a planning application to the local planning authority so that the authority can consider all the circumstances of the case.
11. Permitted development only covers the planning aspects of the development. It does not remove requirements under other regimes such as environmental licensing and permitting or requirements under environmental legislation.
12. In April 2016 the Town and Country (General Permitted Development) (England) Order 2015 was amended to allow for development consisting of the drilling of boreholes for the purpose of carrying out ground water monitoring and seismic monitoring which is preparatory to potential petroleum exploration (which includes shale gas). These permitted development rights are subject to restrictions and conditions. This consultation paper proposes to extend these permitted development rights to the exploratory phase of oil and gas extraction.

Definition of non-hydraulic fracturing shale gas exploration

13. The exploratory phase of oil and gas extraction seeks to acquire geological data to establish whether hydrocarbons are present, which in the case of shale gas may involve drilling an exploration well, and conducting seismic surveys. This is then followed by an appraisal (testing) stage, and then a production stage. At the present time, there are two planning permissions in the county for shale gas exploration: at Springs Road, Misson; and on land off the A634 between Barnby Moor and Blyth.
14. It is proposed in the consultation paper that any permitted development right for exploratory shale drilling would only apply to **shale gas exploration, and for non-hydraulic fracturing operations to take core samples for testing purposes. The consultation states that it would not be appropriate for permitted development rights to extend to allow for the injection of any fluids for the purposes of hydraulic fracturing. The right would not apply to all onshore oil and gas exploration and/or extraction operations.** To also ensure that no hydraulic fracturing would take place it is necessary to tightly define in legislation what development is permitted. Any permitted development right for non-hydraulic fracturing shale gas exploration would not be designed to circumvent the regulatory processes currently culminating in the hydraulic fracturing consent provisions.

15. The following definition is proposed: **'Boring for natural gas in shale or other strata encased in shale for the purposes of searching for natural gas and associated liquids, with a testing period not exceeding 96 hours per section test'**.
16. Where a developer intends to use hydraulic fracturing as part of the operation, or as would be necessary at the appraisal stage, they would be required to obtain planning permission from the relevant minerals planning authority.

Development not permitted

17. The consultation paper proposes that the formulation of any permitted development right will have regard to environmental and site protection laws along with other exemptions. The full list of proposed excluded sites is as follows;
 - Areas of Outstanding Natural Beauty
 - National Parks
 - The Broads
 - World Heritage Sites
 - Sites of Special Scientific Interest
 - Scheduled Monuments
 - Conservation areas
 - Sites of archaeological interest
 - Safety hazard areas
 - Military explosive areas
 - Land safeguarded for aviation or defence purposes
 - Protected groundwater source areas
18. In addition, in accordance with legislation, development which is likely to have significant effects on the environment requiring an Environmental Impact Assessment would not be permitted development. If the proposed development would fall into Schedule 2 of the Environmental Impact Assessment Regulations, it would only be permitted where a local planning authority has issued a screening opinion determining that the development is not Environmental Impact Assessment development, or where the Secretary of State has directed that it is not Environmental Impact Assessment development,

or that the development is exempt from the Environmental Impact Assessment Regulations.

Development conditions and restrictions

19. In the consultation paper it is recognised that due to the scale of shale gas exploration any permitted development right would require specific conditions and restrictions to mitigate any potential adverse impacts of the development. Existing permitted development rights for minerals exploration carry conditions and restrictions to ensure the impact of the development is mitigated, these include:
 - Agreement with the relevant mineral planning authority on the restoration of the land to the condition it was in before the development took place;
 - Limits on the height of any structure assembled or provided;
 - Limits on the height of any substructures and ancillary drilling compounds;
 - Time-limits on both the operation and duration of works;
 - Restrictions on any operations carried out within a certain distance of sensitive site uses;
 - Restrictions on the number of wells within a certain area;
 - Restrictions on development near an aerodrome or airport;
 - No removal of trees from the land.
20. Permitted development rights can also require the local planning authority to consult with bodies with a relevant interest in the impact of the development, this can include the Environment Agency, the Health and Safety Executive, Highways Agency, Natural England, Historic England, as well as others.
21. The consultation seeks comments on what conditions and restrictions would be appropriate for a permitted development right for non-hydraulic shale gas exploration development. Once agreed these conditions would be outlined in the legislation.

Prior approval

22. A condition of any permitted development right can also be a requirement that the developer has to seek prior approval from the local planning authority. Prior approval means that a developer has to seek approval from the local planning authority that specified elements of the development as listed in the legislation are acceptable before work can proceed. The matters for prior approval vary

depending on the type of development, but it can involve a requirement for public engagement through site or written notices to allow representations from local residents, and the views of statutory consultees. Prior approval is a light-touch process which applies where the principle of the development has already been established.

23. For shale gas exploration, local consideration of particular elements of the development may potentially be required to be approved by the relevant minerals planning authority through a prior approval process. The prior approval considerations might include transport and highways impact, contamination issues, air quality and noise impacts, visual impacts, proximity of occupied areas, setting in the landscape, and could include an element of public consultation.
24. The consultation paper seeks views on the potential considerations that a developer should apply to the local planning authority for determination before beginning the development.

Time limited or permanent permitted development right

25. In line with other types of development permitted by the regime it could be appropriate that the proposed changes to the permitted development rights for non-hydraulic fracturing shale gas exploration would only apply for a trial 2 years period starting from the date at which the secondary legislation implementing these changes comes into force, thereby allowing the Government to monitor and measure the success of the right before making a decision on whether to make the change permanent.
26. The consultation paper therefore seeks views on whether the proposed change should apply for 2 years or be made permanent from the start.

Nottinghamshire County Council context

27. In terms of planning applications for shale gas proposals in Nottinghamshire the following have been determined.
 - (a) **Misson Springs site** - planning permission was granted in January 2016 for the drilling and installation of up to 4 sets of ground water monitoring boreholes. In October 2016 planning permission was granted, subject to a legal agreement, for the development of a hydrocarbon well site and the drilling of two exploratory wells, the first vertical and the second horizontal.
 - (b) **Tinker Lane site** – in March 2017 planning permission was granted, subject to a legal agreement, for the development of a hydrocarbon well site comprising a vertical multicore well to target the Bowland shale and Millstone grit geological formations, together with 3 sets of monitoring boreholes to sample and monitor groundwater and ground gas during the drilling of the exploratory well.

28. The decisions for both sites were issued on 24th May 2017 following the completion of the associated legal agreements.
29. Although the terms (restrictions, conditions, prior approval requirements) of the permitted development proposal set out in this consultation paper are still to be determined it is likely that all the applications submitted for Misson Spring and Tinker Lane would have been permitted development had they not required an Environmental Impact Assessment (EIA). As an EIA was volunteered by the applicants for both sites the screening process to determine whether EIA was necessary was not undertaken. This gives a clear indication of the scale of development that could take place (if an EIA were not required) if these extended permitted development rights were introduced. Of course any such proposals would be subject to the conditions, restrictions and any prior approval requirements that the Government deem necessary should this become permitted development.

Parliamentary Housing, Communities and Local Government Committee comments on permitted development

30. The principle of whether non-hydraulic fracturing shale exploration development should be treated as permitted development did not form part of the original remit of the Parliamentary Select Committee, however the final report did briefly cover the issue. The following statement about permitted development was made in the report:

“Shale gas development of any type should not be classed as a permitted development. Given the contentious nature of fracking, local communities should be able to have a say in whether this type of development takes place, particularly as concerns about the construction, locations and cumulative impact of the drill pads are yet to be assuaged by the Government”.

Consultation paper entitled ‘Inclusion of Shale gas production projects in the Nationally Significant Infrastructure Project regime’ (published by Department for Business, Energy and Industrial Strategy - July 2018)

31. Paragraphs 31 to 40 below set out the issues covered in the consultation paper which can be found in Appendix 2. The questions posed by the consultation and the draft responses are set out in Appendix 4 to this report.

Current planning practice for shale gas development

32. Under the current planning regime shale gas proposals must go through the following process:

- Obtain a Petroleum Exploration and Development Licence issued by the Oil and Gas Authority which covers the total area for onshore extraction of hydrocarbons;
 - Obtain planning permission (under the Town and Country Planning Act 1990) from the Minerals Planning Authority for that area or from the Secretary of State for the Ministry of Housing, Communities and Local Government on appeal or if a planning application is called-in by him for determination; and
 - Receive the relevant permits and approvals from regulators such as the Oil and Gas Authority (OGA), Environment Agency (EA) and Health and Safety Executive (HSE).
33. The regulatory regimes are separate, but complementary, to planning permission. In 2015 the Infrastructure Act introduced a range of further requirements that must be met before an operator can carry out high volume hydraulic fracturing in a responsible, sustainable and safe manner. These include the assessment of environmental impacts, groundwater monitoring, community benefits and the exclusion of protected areas. The regulations ensure that the risk of seismic activity during hydraulic fracturing is assessed and that operations are monitored to allow action to be taken where necessary.

National planning regime

33. The Planning Act 2008 provides the legal framework for applying for, examining and determining applications for Nationally Significant Infrastructure Projects (NSIP). This planning process deals with developments including energy, water, road and rail transport and hazardous waste disposal. For projects falling within the scope of what is defined in the Planning Act 2008 as an NSIP then this is the only route for obtaining planning consent and the final decision rests with the relevant Secretary for State. For energy projects including shale gas developments this would be the Secretary of State for Business, Energy and Industrial Strategy.

National Policy Statements

34. A National Policy Statement sets out the national need in policy terms for new or expanded NSIPs. National Policy Statements provide clarity and certainty for developers in establishing national need and certainty in terms of timescale on decision making. National Policy Statements provide a framework within which the Planning Inspectorate makes its recommendation to the Secretary of State on development consent applications. The Secretary of State must also have regard to any local impact report submitted by the local authority and any other relevant matters.

National Significant Infrastructure Projects

35. The NSIP regime is bespoke in three ways:

- Establishes the need: If an application demonstrates that it meets the national evidence base and 'need' in planning policy terms as set out in the National Policy Statement this does not need to be revisited during the determination of the application.
- Timescales: The Planning Act 2008 sets out prescribed timescales for the determination of applications. This means decisions are made within one year of commencement of the examination, unless deadlines are extended by the SoS.
- Single application: If a Development Consent Order is granted it can incorporate other powers which cannot be included in a planning permission, such as compulsory acquisition of land.

Development Consent process

36. Under the Planning Act, an operator wishing to construct a NSIP must submit a development consent application to the Secretary of State (SoS). As part of the application the operator will need to have assessed any likely impacts of the proposed development. The SoS will appoint an 'Examining Authority' to examine the application. This will be either a single inspector or a panel of between two and five inspectors. Following the examination the Examining Authority will make a recommendation to the SoS who will decide whether to grant or refuse consent.

The role of local communities and local authorities within the NSIP regime

37. Members of local communities and local authorities are able and encouraged to get involved throughout the NSIP process;

- Pre-application stage - local communities must be consulted on the proposed project at the pre-application stage. Before commencing consultation the developer must prepare a draft consultation strategy known as a Statement of Community Consultation which must be sent to the relevant local authority for comment. Subsequent consultation must be carried out in accordance with this document.
- Acceptance – All applications must be accompanied by a Consultation Report which must show that the applicant has complied with the pre-application consultation requirements and that they have had regard to the responses they received. The Planning Inspectorate will consider whether this has been complied with and whether to accept the application for examination.
- Examination - If an application is accepted, members of the public have the opportunity to register their interest and participate in the examination. The

host local authority will automatically be an interested party at the examination stage. Local authorities can submit Local Impact Reports which the Examining Authority and Secretary for State must have regard to.

Moving shale gas production into the NSIP regime – criteria for inclusion

38. The consultation document states that “In the UK at present the shale gas sector is in the exploration phase with no commercially active sites in operation”. In this consultation paper the Government is seeking views to ensure that the most appropriate criteria and timings are set for potentially including major shale gas production in the NSIP regime. Planning applications which do not meet the criteria to be considered nationally significant will continue to be subject to the planning process under the Town and Country Planning Act 1990 (i.e. determined by the relevant local authority).
39. The potential criteria which could determine if a shale gas production project is considered nationally significant are set out below:
- Number of wells – the number of wells will vary depending on the geology and gas properties, however with multiple wells from one well-site and potentially multiple wells within a Petroleum Exploration and Development Licence (PEDL) this could provide criteria for when a production project is nationally significant.
 - Recoverable Gas - Other NSIPs have storage capacity as one of the criteria for inclusion in the NSIP regime.
 - Gas production – Sites can vary in the level of production over a given time despite having similar estimated recoverable volumes. Sites could have high flow rates for a number of years and be considered nationally significant.
 - Local or National Grid Connection – A production site may require a direct connection to the local gas distribution network or national transmission system, available for homes and businesses.
 - Associated Equipment – various factors could require equipment to be installed on site. These could include water treatment facilities, micro-generation plants and other gas processing facilities which when combined could result in an expansive development project.
 - Shared Infrastructure – Where there is more than one well-site some operators may develop shared infrastructure, such as road networks, gas/water pipelines and communications/fibre optic cables. Larger scale projects could be considered as nationally significant.

Timing for inclusion

40. In the consultation paper the Government is also seeking views on the most appropriate stage in the industry's development for major shale gas production projects to be included in the NSIP regime. For instance, it may be appropriate to have this in place prior to the first production site application; or alternatively, it may be appropriate to reach an as yet undefined level of shale gas exploration and appraisal activity to inform the viability and scale of shale gas production within England.
41. The topics covered above form the basis of the questions posed by the consultation paper. The actual questions and officers' initial responses are set out in Appendix 4 to this report.

Parliamentary Housing, Communities and Local Government Committee comments on the NSIP regime

42. Following the Select Committee Inquiry a full report of the proceedings and conclusions was published. The following three paragraphs set out their conclusions on this topic.

“There is little to be gained from bringing fracking planning applications at any stage under the NSIP regime; there is limited evidence that it would expedite the application process and such a move is likely to exacerbate existing mistrust between local communities and the fracking industry. We are particularly concerned that if the NSIP regime were adopted, there would be no relationship between fracking applications and Local Plans in communities. Furthermore, we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications.

Fracking planning applications should not be brought under the NSIP regime. While we note that the NSIP regime does provide opportunities for consultation with Mineral Planning Authorities and local communities, such a move could be perceived as a significant loss to local decision-making. Mineral Planning Authorities are best placed to understand their local area and consider how fracking can best take place in their local communities.

Despite our recommendation above and the overwhelming evidence we received, if NSIP were to be used for fracking applications, it is essential that a National Policy Statement is prepared as a matter of urgency that would include suitable measures to restrict inappropriate proliferation of well-pads and unacceptable impacts on landscapes. We consider that the North Yorkshire Draft Joint Minerals and Waste Plan offers an appropriate template for such guidance. While we note that the Government stated that the issue of cumulative impact “would be addressed on a case by case basis as part of the NSIP examination process,” the National Policy Statement should ensure that it is

considered automatically as part of every determination. Every decision should also be consistent with Local Plans.”

Statutory and Policy Implications

43. This report has been compiled after consideration of implications in respect of finance, the public sector equality duty, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment, and those using the service and where such implications are material they are described below.

Human Rights Implications

44. Relevant issues arising out of consideration of the Human Rights Act have been assessed. Rights under Article 8 (Right to Respect for Private and Family Life), Article 1 of the First Protocol (Protection of Property) and Article 6 (Right to a Fair Trial) are those to be considered. In this case, however, there are no impacts of any substance on individuals and therefore no interference with rights safeguarded under these articles.

RECOMMENDATIONS

45. It is recommended that Members consider the draft response to the questions posed by the two consultation papers issued by the Government and provide comments to officers in order that they can finalise the County Council's formal response, which will be brought back to this committee in October for final approval.

ADRIAN SMITH

Corporate Director – Place

Constitutional Comments [SJK 31.8.2018]

The recommendation falls within the remit of the Planning and Licencing Committee.

Comments of the Service Director – Finance [RWK 29.8.2018]

There are no specific financial implications arising directly from the report.

Background Papers Available for Inspection

The application file available for public inspection by virtue of the Local Government (Access to Information) Act 1985.

Electoral Divisions and Members Affected

All

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